(3)

No. 90-1090

FILED
MAR 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Petitioners,
vs.
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER A. SCHEY
Counsel of Record
CARLOS HOLGUIN
CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
256 S. Occidental Boulevard
Los Angeles, California 90057
(213) 388-8693

SUSAN GZESH
CHICAGO LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

DANIEL KATZ
CENTER AMERICAN REFUGEE CENTER

Attorneys for Respondents

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether section 242(A)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1152(A)(1), precludes district court subject-matter jurisdiction over plaintiffs' Constitutional and statutory challenge to a nation-wide, blanket regulation prohibiting people arrested by the Immigration and Naturalization Service (INS) from working pending the outcome of their deportation hearings?

2. Whether a regulation promulgated by the INS requiring indefinite detention without bond for persons who work without agency permission pending the outcome of their deportation hearings exceeds the statutory authority on detention, INA § 242(a), 8 U.S.C. § 1252(a)?

///

///

///

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

I. Alien Employment in the Immigration Act 2

II. The Immigration Act and Detention 5

III. INS Bond Regulations and Employment 6

IV. The Challenged Regulation's Intended Purposes 10

V. The Harm Caused by the "No Work" Regulation 12

ARGUMENT 13

I. The District Court Possessed Subject Matter Jurisdiction 13

II. The "No-Work" Regulations Are Ambiguous Making This An Inappropriate Case For Supreme Court Review 13

III. The Language of Section 242 Does Not Authorize INS's Blanket No-Work Bond Condition 14

IV. The Legislative History of Section 242 Does Not Support INS's Interpretation Of The Statute 16

V. Neither Judicial Nor Administrative Authorities Support INS's Blanket "No Work" Bond Condition 19

VI. The INA Nowhere Permits Indefinite Incarceration as a Control on Alien Employment 22

A. Pre-IRCA 22

B. IRCA Limits Controls to Employer Sanctions 22

i.. IRCA Clearly Distinguishes Threats to National Security From Employment Concerns..... 22

ii.. Congress in IRCA Approved "Employer" Sanctions, Not "Employee" Detention as the Means to Prevent Unauthorized Employment..... 23

iii. Congress (And the INS in Testimony Before Congress) Specifically Rejected the Approach Adopted by INS In Its "No-Work" Regulation..... 24

iv. The Challenged Regulation Directly Conflicts With and Frustrates Exemptions Contained In IRCA..... 26

VII. Petitioners' "No-Work" Regulation Raises Significant Constitutional Questions..... 28

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U.S. 418 (1979)..... 28, 29

C.M.K. v. Richardson, Attorney General, 371 F.Supp. 183 (E.D. Mich. 1974)..... 6

Carlson v. Landon, 342 U.S. 524 (1952)..... 17, 19, 20, 29

Del Rey Tortilleria, Inc and Local 76, International Ladies Garment Workers Union, Case No. 13-CA-25033 (NLRB, Division of Judges, Dec. 7, 1988)..... 27

Gernstein v. Pugh, 420 U.S. 103 (1975)..... 28

Ingraham v. Wright, 430 U.S. 651, 673-74 (1977)..... 28

INS v. Lopez-Mendoza, 468 U.S. 1032, 1044, 104 S.Ct. 3479, 3486, 82 L.Ed.2d 778 (1984)..... 5

Liacakos v. Kennedy, 195 F.Supp. 630 (D.D.C. 1961)..... 6

Local 512, Warehouse & Office Workers v. NLRB, 795 F.2d 705, 721 (9th Cir. 1986)..... 6

Maka's Akami Service v. INS, 904 F.2d 1351 (9th Cir. 1990)..... 5

Matter of Battista, BIA Interim Decision 3036 (Oct. 21, 1987)..... 6

Matter of Patel, Interim Dec. No. 2491 (BIA 1976)..... 21

Matter of Toscana-Rivas, 14 I&N 523, 542, Int.Dec., 2256 (1973), 2256 (1973)..... 7, 21

Matter of Vea, Interim Dec., 2890 (BIA 1981)..... 22

McNary v. Haitian Refugee Center, Inc., No. 89-1332 (February 20, 1991)..... 13

O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).....28, 29

Plyler v. Doe, 457 U.S. 202 (1982)..... 6

Railroad Trainmen v. B. & O.R. Co., 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947)..... 14

Rubenstein v. Brownell, 206 F.2d 449 (D.C.Cir. 1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954)..... 20

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984)..... 22

United States v. Harris, 347 U.S. 612, 618 (1954)..... 28

United States v. Healey, 160 U.S. 136, 40 L.Ed. 369 (1889)..... 15

United States v. Witkovich, 353 U.S. 194 (1957)..... 20, 21, 29

USA v. Scandia Interiors, Executive Office for Immigration Review (EOIR), Case No. 90100229 (Jan. 25, 1991)..... 5

USA v. Walia's, Inc., EOIR, Case No. 89100259 (Jan. 5, 1990)..... 5

Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977)..... 6

Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950).....29

Woodby v. INS, 385 U.S. 276, 488 (1966)..... 6

Youngberg v. Romeo, 475 U.S. 307 (1975)..... 28

Statutes and regulations

8 U.S.C. § 156.....16

8 U.S.C. § 1154..... 3

8 U.S.C. § 1182(a)..... 2

8 U.S.C. § 1182(a)(14).....23

8 U.S.C. § 1182(a)(27).....23

8 U.S.C. § 1182(a)(28)(C), (D), (F)..... 2

8 U. S. C. § 1182(c)..... 2

8 U.S.C. § 1252(a).....13

8 U.S.C. § 1252(b)..... 6

8 U.S.C. § 1253(h)..... 2

8 U.S.C. § 1254..... 2

8 U.S.C. § 1255(c)(2)..... 2, 3

8 U.S.C. § 1255a(d)(2)(A).....2, 23

8 U.S.C. § 1255a(d)(2)(B)(ii)(IV).....22

8 U.S.C. § 1255a(d)(2)(B)(iii).....23

8 U.S.C. § 1324a.....3, 23

8 U.S.C. § 1329.....13

8 U.S.C. § 1357(a)(2)..... 5

8 U.S.C. §§ 1182(a).....23, 23

28 U.S.C. § 1331.....13

Act of Feb. 5, 1917, Ch. 29, § 20, 39 Stat. 874 (1917).....16

Immigration Reform and Control Act of 1986, Pub.L.No. 94-571, §6, 90 Stat. 2705-2706.....3, 4

Pub. Law No. 99-603, 100 Stat. 3359, 3372, § 101(a)(3)..... 4

Pub.L. 831, 81st Cong., 1st Sess. § 23,
reprinted in [1950] U.S. Code Cong. Serv. 1006.....16, 18

Subversive Activities Control Act of 1950, Pub. L. 831,
54 Stat. 987, 1010 (1950).....18

8 C.F.R. § 103.6(a)(2).....7, 8, 14

8 C.F.R. § 103.6(a)(2)(ii).....7, 10, 13

8 C.F.R. § 103.6(a)(2)(iii).....9

8 C.F.R. § 242.2(a).....2

8 C.F.R. § 274a.7.....26

8 C.F.R. § 274a.12(c).....8, 9

8 C.F.R. § 274a.14(a)(1)(ii).....9

8 C.F.R. § 274a.14(a)(2).....9

8 C.F.R. § 274a.2(b)(v)(iii)(E),(G).....5, 27

Other authorities

1118 Cong. Rec. 30155 (1972).....25

118 Cong. Rec. S16912 (1986).....26

132 Cong. Rec. H9708 (1986).....23

1950 U.S. Code Cong.Serv. 1006.....17, 18

48 Fed. Reg. 51142.....10, 14

48 Fed.Reg. 51143 ..... 8, 14

Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, Vol. 2, No. 2 International Journal of Refugee Law at 252, 259-60 (1990) 11

Conference Report accompanying the Subversive Activities Control Act of 1950, *reprinted at* 1950 U.S. Code Cong. Serv. 3911 18

Employer's Immigration Compliance Guide, Mathew Bender, Rel. 24 (jan. 1989) at 3; Rel.25 (Feb. 1989) at 2; Rel. 26 (Mar. 1989) at 2.....5

Fed.Reg. Vol. 48, p. 8820 10

H. R. Rep. No. 99-682(I) 4, 23, 24

H. Rep. 99-603(I)..... 26

H.R. 16188, 92nd Cong., 2d Sess. (1972) 25

H.R. 982, 93rd Cong., 2d Sess. (1973)..... 25

H.R. Rep. 1365, 82d Cong., 2d Sess. 57 *reprinted in* [1952] U.S. Code Cong. & Ad. News 1653..... 19

H.R. Rep. No. 1192, 81st Cong., 1st Sess., 6 (1949) 16, 17

H.R. Rep. No. 99-682(I), at 57; U.S. Code Cong. & Ad. News 5661..... 26

H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess.,51-56 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5650 ..... 3, 26

H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5655-5660 23

H.R.Rep.No. 1000, 99th Cong., 2d Sess. 58 (1986) 27

Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13, pts. 1-5, pt. 1 ..... 3, 4, 24, 25

Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273.....4, 23, 25

Interpreter Releases, September 26, 1988 at 100-1007.....5

Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J.Legis. 41 (1987).....3

Mitgang, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 Univ. of Calif. Davis L. Rev. 323 (1975).....6

Rand Corporation, Enforcing Employer Sanctions, (1990) at 36.....3

S. Rep. No. 1137, 82d Cong., 2d Sess. 30 (1952).....19

S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).....17

S. Rep. No. 99-132, 99th Cong., 1st Sess.at 18-27.....23

In The Supreme Court of the United States

October Term, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case neither the district court nor the court of appeals reached the sweeping decision Petitioners claim in their Petition for Writ of Certiorari ("Cert.Pet."). The court of appeals did not decide that the Attorney General has "no authority for *detention* in relation to unauthorized employment." Cert.Pet. at 23 (emphasis in original).[1] The court of appeals' opinion does *not* restrict the INS from imposing employment-related conditions in release bonds which are "rationally related" to the purposes of Section 242(a) (appearance at future proceedings or the public safety or national security). App. 24a.

---

[1] The Petition quotes half the court's sentence, which reads in full: "Further, our review of the treatment of employment riders by the Board of Immigration Appeals and the Attorney General discloses no authority [in their decisions] for detention in relation to unauthorized employment." App. 35a.

This case involves something else: INS regulations which impose a *blanket*, non-individualized condition on all release bonds prohibiting employment pending the outcome of statutorily mandated deportation proceedings. Those unable to accept the "no-work" bond rider condition, are denied bail; those caught working in violation of the condition are rearrested and jailed without bond until proceedings to determine their deportability are completed, a process that often takes years. In short, this unprecedented regulation, promulgated thirty years after the statute upon which it relies, tells immigrants that they are welcome to exercise their right to a deportation hearing, but must do so either while jailed indefinitely or while going cold, hungry and homeless, and without the ability to retain counsel. App. 47a (the reguation "force[s]" those arrested "to choose between starving on the streets or remaining in detention").

I. Alien Employment in the Immigration Act

Since 1952, Congress has amended the INA numerous times, including several provisions dealing with employment. However, Congress has never seen fit to enact a statute providing for the detention of aliens who become employed without INS authorization. On the contrary, Congress has repeatedly enacted provisions allowing aliens to win relief from deportation or regularize their status *despite* previous or on-going unauthorized employment. *See, e.g.*, 8 U.S.C. §§ 1182(a), (c), 1253(h), 1254, 1255, 1255a(d)(2)(A).[2]

---

[2] Petitioners pretend that the majority of immigrants coming to the United States need employment authorization, with the "exception" of close relatives of U.S. citizens and lawful permanent residents. Cert.Pet. 3. In fact, the vast majority of immigrants need no employment authorization at all. 1987 *Statistical Yearbook of the Immigration and Naturalization Service*, at xvii, Table A (80% of all lawful immigrants enter without having to obtain employment certificates). Furthermore, Congress has opted not to deny visas to aliens who have previously worked in the United States without authorization. INA § 212(a), 8 U.S.C. § 1182(a). Petitioners are wrong when they state that in 1976, Congress provided, in 8 U.S.C. § 1255(c)(2), that "aliens could not become permanent residents if they accepted unauthorized employment before filing their adjustment applications." Cert.Pet. 4. If they are the "immediate relative" of a U.S. citizen, these aliens (the vast majority of immigrants) *can* adjust their status in the United States *regardless of prior unauthorized employment*. § 1255(c). Others are not denied "permanent resident" status as claimed by Petitioners -- they must simply depart the U.S. and obtain their visas at a U.S. consular office abroad. INA § 204, 8 U.S.C. § 1154.

In any event, the significance of the regulation at issue has been completely overtaken by Congress' enactment of the Immigration Reform and Control Act of 1986, Pub.L.No. 94-571, §6, 90 Stat. 2705-2706 ("IRCA"). Unlike INS's approach to alien employment (indefinite detention without bond), the IRCA is a carefully crafted political compromise which balances specifically chosen measures discouraging illegal employment with measures to avoid disruption of production. *See* Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J.Legis. 41 (1987).[3]

The IRCA regulates employment through *employer* sanctions. INA § 274a, 8 U.S.C. § 1324a.[4] Leading up to the enactment of employer sanctions, top INS officials repeatedly testified in Congress that detaining aliens for working without authorization pending the outcome of deportation hearings was *not* an option considered necessary by the INS.[5]

In the months leading up to the passage of the IRCA, Congress specifically rejected detention of unauthorized *employees* as. A

---

[3] Exemptions in IRCA, see *infra*, were intended to "mitigate adverse effects [of the bill] on the supply of labor." Rand Corporation, *Enforcing Employer Sanctions* (1990) at 36.

[4] *See* H. R. Rep. No. 99-682(I) at 45 ("The bill [IRCA] establishes penalities *for employers . . .*")(emphasis added); *Id.* at 46 ("Employers will be deterred by the penalties in this legislation...").

[5] Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13, pts. 1-5, pt. 1 at 46 ("1971 Hearings") (testimony of James L. Hennessey, Executive Assistant to the Commissioner of the INS: *"We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him"*); 1971 Hearings, pt. 3 at 919 (testimony of Thomas M. Pederson, INS District Director for Detroit: *"I do not feel that . . . imprisonment is the answer "* to unauthorized employment); 1971 Hearings, pt. 1 at 89-90 (testimony of Southwest Regional Counsel Joseph Sureck: "I personally am not so concerned to add a further penalty upon an [unauthorized] employee").

witness before the Senate Immigration Subcommittee proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Correctly noting that this idea was "not something new," *id.* at 56, Senator Simpson, Chairman of the Committee and primary author of IRCA in the Senate, scored the detention approach as being "politically harsh, . . . [and] unrealistic..." Id.[6]

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General agreed: Only through "employer sanctions" can the "entry of illegal aliens into jobs" in the U.S. "be addressed effectively." *Id.* at 105.

INS's "no work" regulation also conflicts with important exemptions created within IRCA. To avoid disruption of production, Congress provided that aliens *without* work authorization hired before the date of enactment may continue to be employed *without* penalty on the employee or employer. Pub. Law No. 99-603, 100 Stat. 3359, 3372, Sec. 101(a)(3) ("Grandfather For Current Employees"). While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions,.INS's challenged regulation prohibits their employment.

As a result of this statutory exemption, numerous INS administrative and judicial proceedings have taken place regarding the

---

6 Senator Simpson expressed his opposition to the detention proposal, stating that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought, and the thought of the Select Commission, we ought to try the most humane one [i.e. employer sanctions] first ... if we do not get that done, then we will go on to other methods ... [today] are expressed out of frustration ..." *Id.*

meaning of "grandfathered employees."[7] Other federal agencies, including the National Labor Relations Board (NLRB), have relied upon the fact that "the applicable INS regulations [8 C.F.R. § 274a.2(b)(v)(iii)(E),(G)] provide that the 'grandfather' requirement of continuing employment is met *where an employee is reinstated after a wrongful termination* . . ." NLRB Memorandum GC-88-9, *Reinstatement and Backpay Remedies for Discriminatees Who Are 'Undocumented Aliens'* (September 1, 1988) (emphasis added).[8]

INS's 1983 "no work" regulation is completely out of step with IRCA's exemptions to employer sanctions. At this stage there is little policy reason for review of INS's outdated 1983 regulations by this Court.

II. The Immigration Act and Detention

Pursuant to INA § 287, 8 U.S.C. § 1357(a)(2), a person may be arrested by INS if "believed to be in the United States in violation of law." Following arrest, approximately 97.5% of all persons waive their right to a hearing and agree to accept "voluntary departure."[9] This case involves only the 2.5% of arrested persons who wish to exercise their right to a hearing. While INS's regulation pressumes that all arrested people are deportable, and therefore can be denied the ability to work, at the deportation hearing it is uncontested that the INS has the burden of proving deportability by "clear, unequivocal and convincing evidence . . ." *Woodby v. INS*, 385 U.S. 276, 488 (1966). As this Court has recognized, "[t]here is no assurance that a [person] subject to deportation [proceedings] will ever be deported."

---

7 *See generally* Employers' Immigration Compliance Guide, Mathew Bender, Rel. 24 (Jan. 1989) at 3; Rel. 25 (Feb. 1989) at 2; Rel. 26 (Mar. 1989) at 2. *See also Maka's Akami Service v. INS*, 904 F.2d 1351 (9th Cir. 1990); *USA v. Scandia Interiors*, Executive Office for Immigration Review (EOIR), Case No. 90100229 (Jan. 25, 1991) (available on Lexis) at 4-5 (because alien workers were "grandfathered," they were not "unauthorized aliens" for employment purposes); *USA v. Walia's, Inc.*, EOIR, Case. No. 89100259 (Jan. 5, 1990) (interpreting "grandfather" provision).

8 *See* Interpreter Releases, September 26, 1988, at 1001-1007.

9 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044, 104 S.Ct. 3479, 3486, 82 L.Ed.2d 778 (1984).

Plyler v. Doe, 457 U.S. 202, 206 (1982). Persons arrested by the INS are often entitled to be and remain in the United States.[10]

INA § 242(a), 8 U.S.C. § 1252(a), provides that following arrest persons may be

> continued in custody or . . . released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe.

Id. For twenty (20) years following the enactment of § 242, the INS read "containing such conditions as the Attorney General may prescribe" to refer to conditions relating to the persons *presence* for hearings and deportation, and conditions to protect national security.

III. INS Bond Regulations and Employment

The INS "admit[s] that [until the "no work" regulation was issued] immigration judges considered the alien's employment history as indicative of stability and an assurance that he will not abscond." App. 34a.

In 1973 INS promulgated regulations which provided that the district director could impose in *individual* release bonds "a condition barring unauthorized employment . . ." 8 C.F.R. § 103.6(a)(2)(ii). However, until the "no work" regulation was issued in 1983, detention was never considered a permissible response to

---

[10] *See, e.g., Local 512, Warehouse & Office Workers v. NLRB*, 795 F.2d 705, 721 (9th Cir. 1986); *Whetstone v. INS*, 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *C.M.K. v. Richardson, Attorney General*, 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"); *Liacakos v. Kennedy*, 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *Matter of Battista*, BIA Interim Decision 3036 (Oct. 21, 1987) (respondednt arrested and placed in deportation proceedings in 1983; BIA reverses deportation order four years later)Matter of Naulu, BIA Interim Decision 3005 (Jan. 30, 1986) (found deportable by Immigration Judge in 1983; reversed by BIA three years later). *See, generally*, Mitgang, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 Univ. of Calif. Davis L. Rev. 323 (1975).

unauthorized employment. In *Matter of Toscana-Rivas*, 14 I&N 523, 542, Int.Dec. # 2256 (1973), the Board stated:

> Even if the bond is breached [in violation of an individualized condition barring unauthorized employment], it by no means follows that confinement is desirable or indicated, or will necessarily take place . . .
>
> * * *
>
> The penalty is not detention . . . but the loss of the $500 . .

Id. at 539. Even the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542.

The Attorney General examined the issue presented in *Toscana-Rivas* and concluded that employment-related conditions were acceptable *after* deportability was established in "*cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security.*" *Id.* at 556 (emphasis added). The Attorney General required an individualized showing. *Id.* at 556-57 & n. 23.

Finally, in 1983 the INS promulgated the "no-work" regulation, which provides, in relevant part:

> A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding ... unless the District Director determines that employment is appropriate . . .
>
> *Only those aliens who* upon application under § 109.1(b) of this chapter *establish compelling reasons for granting employment authorization may be authorized to accept employment.*

8 C.F.R. § 103.6(a)(2) (1983) (emphasis added).[11]

---

[11] Among the factors which "may" be considered when an application is made, are the following: (1) Safeguarding employment opportunities for United States citizens; (2) Whether there is a reasonable basis for considering discretionary relief; and (3) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist. Whether or not these factors are

The notice accompanying the final regulation states that the condition barring employment will not be imposed against individuals "maintaining a colorable claim to U.S. Citizenship and permanent resident aliens . . ." 48 Fed.Reg. 51143. Neither the regulation nor the INS's Operating Instruction (internal guidelines) describe the procedures for distinguishing a "colorable" claim. If INS believed a person had a "colorable" claim to citizenship or lawful resident status, they would not initiate a deportation hearing in the first place.[12]

A small number of aliens already have employment authorization at the time they are arrested by the INS. 8 C.F.R. § 274a.12(c) (categories of non-immigrants, including tourists, students, etc., sometimes granted employment authorization incident to their status). INS states that the "no-work" regulation "would not diminish any employment authorization that [such] an alien already had" at the time of arrest. Pet.Cert. at 8, 19, 20.[13] However, another regulation

---

present, the INS may or may not exercise its discretion to grant employment authorization.

[12] The text of the challenged regulation provides no exemption and the INS earlier conceded that the "no work" bond condition is *not* automatically waived for U.S. citizens and lawful permanent residents: "In cases in which the condition may be erroneously applied [to U.S. citizens or lawful permanent residents], such persons can easily prove their authorization to work by producing their 'green cards' . . . [or] their file number to the INS so that their status can be verified." Appellants Brief to Ninth Circuit (Oct. 30, 1985) at 39-40. This fails to recognize that the majority of people living in this country do not have INS files that can be "verified." Many U.S. citizens cannot "easily" produce proof of birth in this country. The district court, which received testimonial and documentary evidence, noted that "all aliens who post bond are automatically subjected to the no-work condition . . . At a minimum, individuals subjected to the no-work condition will be unable to work and support themselves until the District Director . . . determines that they may do so." App. 116a.

[13] INS asserted for the first time on appeal that "anyone who has work authorization can easily establish this fact." App. 12a; see also Cert.Pet. 19 (proof of prior work authorization "should be readily available" to the detained alien). As we point out above, no matter how "easy" the task, it is of no importance since the regulations specifically

clearly does so. Employment authorization "*automatically terminate[s]*" upon arrest and the initiation of deportation proceedings. 8 C.F.R. § 274a.14(a)(1)(ii). In fact, no "notice of intent" to revoke is even required. § 274a.14(a)(2).

The vast majority of citizens, non-citizens and, of course, INS arrestees do not possess "work permits" issued by the INS. The "no-work" regulation applies to all such persons. People arrested by the INS cannot be released from detention without agreeing to the "no-work" rider condition, and they cannot apply or reapply for work authorization until they are released from detention. § 274a.12(c)(13). As stated by the court of appeals: "Application for authorization to work is dependent upon release from detention; release from detention is dependent upon the promise not to work." App. 8a.

The challenged regulation allows application for work authorization only following release and if *"compelling reasons"* are shown. 8 C.F.R. § 103.6(a)(2)(iii) (emphasis added). If "compelling reasons" are established, the person *"may* be authorized to accept employment" if the INS "determines that "employment is appropriate." *Id.* (emphasis added). The *uncontroverted* evidence established that INS had no consistent procedure for the processing of work authorization applications, and rarely granted such authorization when it was sought.[14] While the bond condition can be reviewed by an Immigration Judge, that procedure is "informal" and not a due process hearing.[15] In the informal "bond redetermination"

---

provide that employment authorization ends upon arrest and the initiation of deportation proceedings.

[14] *See, e.g.* C.R. 16 (Exhibit AA ¶ 13); C.R. 16 (Exhibit CC ¶ 4) (8 months to receive a decision); C.R. 16 (Exhibit DD, ¶ 4[g]) (no criteria; 80% denial rate); C.R. 16 (Exhibit GG, ¶ 4) (same); C.R. 16 (Exhibit OO ¶ 6) (same); C.R. 16 (Exhibit PP ¶s 7-9) (same); C.R. 16 (Exhibit RR ¶ 5) (often takes "years" to receive a decision).

[15] *See* INS' Opening Brief, filed in the Court of Appeals, dated February 22, 1984 at 9 n. 4; *see also* Reporter's Transcript of Proceedings (12-16-83) ("R.T.") at 19, lines 11-14 (Government states to district court: "The Government has never represented in the course of these proceedings that a transcript was made of the bond redetermination] hearing."; *see also* R.T. 130, line 15; R.T. 32, line 22; R.T. 130, line 20; R.T. 132, line

proceedings, no record is made, and the person seeking to remove a no-work restriction is rarely permitted to testify, present witnesses, or rebut derrogatory evidence.[16] Such review can take from a few days to "two months or more." RT II at 29; RT II at 138 (same). When an individual sought removal of an employment prohibition *after* release, it can take INS "an entire year" before a hearing is even scheduled. C.R. 16, Exhibit AA at 4.

Persons released on bond will be arrested and detained *without bond* if found working in violation of the "no-work" rider. 48 Fed.Reg. 51142 ("[w]here the 'no work' condition is violated, *the appropriate response would be to take the alien [back] into custody*") (emphasis supplied). No due process hearing of *any* type is provided *before or after* a person's ability to work or remain free on bond is terminated.

IV. The Challenged Regulation's Intended Purposes

The uncontested evidence shows that the blanket no-work bond condition *does nothing to preserve jobs for U.S. workers*, its intended purpose.[17] Dr. Leo Chavez, a specialist in migration to the United States, testified in the district court that the relationship between "no-work" bond conditions, which effect only a few thousand persons each year who contest deportability, and protecting jobs for U.S. workers is "like making a dam out of a bucket of sand and trying to stop all the rivers that flow to the ocean." RT II at 90.

Dr. Patricia Hernandez Kelly, an expert on labor migration, testified that she could think of no evidence indicating that the "no-work" regulations would decrease the unemployment of U.S.

16; C.R. 16 (Exhibit DD at 11 lines 6-28) (all relating to informal nature of bond redetermination hearing before Immigration Judges).

[16] C.R. 16 Exhibit AA ¶¶ 10-11; C.R. 16 Exhibit DD at 11; R.T. 130, line 15; R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, line 20; R.T. 132, line 16.

[17] Although the INS justified the new regulations as preserving employment for authorized workers, the regulations in fact *eliminated* all but one of the labor market considerations set out in the original 1973 regulations and the proposed 1983 regulation. *See* 8 C.F.R. § 103.6(a)(2)(ii); Fed.Reg. Vol. 48, p. 8820.

workers. RT II at 124. She described the effect of the regulation akin to "*throwing dice*." RT II at 114, 116 (emphasis added).[18]

Throughout seven years of litigation INS has not offered a shred of evidence to show any relationship between its regulation and the preservation of jobs for U.S. citizens.

INS states that the challenged regulation is also meant to remove the "incentive" of arrested persons "to delay deportation proceedings." Cert.Pet. at 8. The regulations demand that working people choose either their stomachs or their constitutional right to a deportation hearing. The penalty imposed by Petitioners' regulations does not distinguish between "delays" in expulsion fully justified because the person might not be an alien at all, *or* may not be a deportable alien, and those not similarly justified; nor, for that matter, who is to blame for the delay. Recent studies suggest that the INS and immigration courts, not those subjected to deportation proceedings, bear most of the blame for delays in concluding hearings.[19] INS has never submitted a shred of evidence indicating that Respondents or their class members in *any* way have sought to "delay" their deportation proceedings. Nor has the INS offered any mechanism to allow people deprived of their ability to work to expedite such hearings.

[18] For its part, the INS could produce *no* evidence that preventing people from working pending the outcome of deportation proceedings would increase job opportunities for U.S. workers. Given the small number of persons who assert their right to a hearing, it would be a rare citizen who would find employment as a result of the INS's disapproved regulations.

[19] *See, e.g.*, Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, Vol. 2, No. 2 International Journal of Refugee Law at 252, 259-60 (1990) ("majority" of delays caused by Government).

V. The Harm Caused by the "no Work" Regulation

The record in this case is replete with references to the detrimental effects of forcing persons released on bond to become unemployed. The no-work bond condition would directly effect their ability to win release on a reasonable bond.20 It effects their ability to obtain health care when needed. RT II at 102-103. Most would not be able to support themselves. RT II at 46. Such persons would have difficulty retaining counsel to represent them in their deportation proceedings.21 Many would be forced to abandon their right to appear and contest deportation.22 While the INS undertook *no* studies or investigation to determine the impact its regulation would actually have on anything, the agency does not dispute that "the ultimate result is that a *substantially* larger number of aliens will be unable to secure immigration bonds and *will be detained* ***indefinitely*** pending the resolution of their claims [in deportation proceedings]." App. 17a (emphasis added).

As discussed in detail *infra*, the court of appeals' decision in this case neither conflicts with the decisions of other court of appeals, nor does it decide an important question of federal law which has not been, but should be, settled by this Court. Nor can it be argued that the court of appeals misapplied, misconstrued or misconceived applicable Supreme Court decisions. As we discuss next, those decisions are clear and were literally applied by the court of appeals in this case.

ARGUMENT

---

20 Eleven of the Respondents were in INS detention, unable to secure their release because of the "no work" bond condition. C.R. 13 at 8-16. For those not in detention, the challenged regulation directly affected their ability to survive pending the outcome of their deportation hearings. C.R. 13 at 9, 11 and 16.

21 *See, e.g.*, C.R. 4 (Exhibit B ¶ 4[a]); C.R. 4 (Exhibit C ¶ 4); C.R. 4 (Exhibit D ¶ 8); C.R. 4 (Exhibit E ¶ 6); C.R. 16 (Exhibit HH); RT II at 134.

22 *See, e.g.*,C.R. 4 (Exhibit B at 4); C.R. 4 (Exhibit C ¶¶ 3 and 6); C.R. 4 (Exhibit D ¶ 6).

I. The District Court Possessed Subject Matter Jurisdiction

The INS challenges the jurisdiction of the district court, asserting that "[t]he INA limits review of 'any determination . . . concerning . . . release on bond' to individual habeas corpus proceedings." Cert.Pet. 14, *citing* 8 U.S.C. § 1252(a)(1). Section 1252(a)(1) on its face deals only with complaints about *delays* in determining deportability in individual cases. App. 4a-5a. This case has *nothing* to do with delays in reaching decisions on deportability.

Jurisdiction is proper under 28 U.S.C. § 1331 and 8 U.S.C. § 1329. *McNary v. Haitian Refugee Center, Inc.*, No. 89-1332 (February 20, 1991).

II. The "No-Work" Regulations Are Ambiguous Making This An Inappropriate Case For Supreme Court Review

As we discuss in detail *infra*, this Court has previously ruled on the power to detain under INA § 242(a), and those decisions have been followed by the lower courts for decades. There is little reason for this Court to revisit the issue based upon regulations the meaning of which have become more ambiguous over time as INS has retreated from the plain meaning of the words of the regulation at various stages of the litigation.

Judge Trott's dissent points out that there is now little agreement in this case over the meaning of INS's regulations:

> I am not sure what this case is about . . . I suppose its none of my business, but it seems the way out of this power struggle is for the *INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflect its objectives* . . . If [INS did so], it has the untrammeled power to get [this case] over with and end this debate."

913 F.2d at 1375 (J. Trott, dissenting)(emphasis added).

The "debate" involves whether INS's regulation bars "employment" or "unauthorized employment." While the caption of the regulation refers to "unauthorized employment," the body of the regulation speaks only of prohibiting "employment." 8 C.F.R. § 103.6(a)(2)(ii). The notice accompanying the final rule referred to the condition as a *"no-work rider"* that would be imposed on every bond in the country. 48 Fed.Reg. 51142-43 (Nov. 7, 1982) (emphasis

added).[23] "[T]he heading of a section cannot limit the plain meaning of the text." *Railroad Trainmen v. B. & O.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947) (statutory interpretation).

Further confusion is generated because the challenged regulation states that "*[o]nly*" those aliens who, "upon application under § 109.1(b) of this chapter" establish compelling reasons for granting employment authorization may be authorized to accept employment. 8 C.F.R. § 103.6(a)(2). However, because of subsequent amendments in the regulations, INS no longer has a § 109.1(b) "under" which arrested persons subject to the challenged "no work" bond rider can make "application" for removal of the "no work" condition.

III. The Language of Section 242 Does Not Authorize INS's Blanket No-Work Bond Condition

Section 242(a) is entitled "Arrest and Custody." It deals with whether a respondent in deportation proceedings shall be "continued in custody" or "released under bond . . . containing such conditions as the Attorney General may prescribe" pending the outcome of deportation proceedings. Every aspect of the statute concerns *where* the respondent will be pending resolution of the deportation hearing. The statute employs no words or phrases authorizing the INS to impose blanket employment restrictions in bonds written to secure a respondent's release from detention.[24]

---

[23] INS's internal Operating Instruction issued pursuant to the "no-work rider" regulation requires INS employees releasing persons on bond pending the outcome of their deportation hearings to stamp their Order to Show Cause document (which contains the bond upon which release is obtained) with the words: "Bond -- Employment Not Authorized." Record at 44, Exhibit A.

[24] It should be stated at the outset that Petitioners' contention that this Court should defer to the Attorney General's interpretation of the Congressional is without merit. As we have discussed in the Statement *supra*, the Attorney General has had anything but a long-standing interpretation in this matter. If the agency construction has not been uniform, and it has not been here, "the rule which attaches great weight to

The ordinary meaning of the words employed by Congress in § 242(a) lead to the conclusion that the statute is concerned with the *appearance* of a respondent at future proceedings, and not whether the respondent will engage in employment while proceedings are pending.[25] While the INS argues that § 242(a) authorizes the agency to impose *any* conditions reasonably related to the "broad purposes" of the Act, Cert.Pet. 22, no words or phrases in § 242(a) mention anything about the "broad" purposes of the Act.[26]

Section 242(a) deals with release during deportation proceedings, while § 242(d) deals with release of persons found deportable and detained for six months thereafter. Under § 242(d), the Attorney General is clearly provided *additional* powers not mentioned in § 242(a). These include the power to require the alien "to conform to such reasonable written *restrictions on his conduct or activities* as are presecribed by the Attorney General." § 242(d) (emphasis added). Section 242(a), at issue here, does *not* contain similar authority to set bond conditions restricting the released person's "conduct or activities."[27]

---

administrative interpretation is inapplicable." *United States v. Healey*, 160 U.S. 136, 40 L.Ed. 369 (1889).

[25] In fact, the statute contains none of the key words or phrases -- e.g. "employment," "work," "safeguarding employment opportunities for U.S. citizens," "compelling reasons for granting work authorization," etc. -- essential to explain INS's regulation.

[26] If INS can impose conditions of bond related to any of the "broad purposes" of the Act, it can virtually detain every alien without bond pending the outcome of deportation hearings. Every person charged with being deportable has allegedly violated one of the twenty (20) grounds of deportation, INA § 241(a), and each ground relates to a "broad purpose" of the Act. Thus bond could be conditioned on not receiving public assistance, 241(a)(15), not being institutionalized at Government expense because of a mental disability, 241(a)(3), not expressing certain political opinions, 241(a)(6), etc.

[27] The Petition states that "Congress could not have been more explicit in stating its intent to grant the Attorney General broad power to impose bond conditions." Cert.Pet. at 23. As we have just shown, if Congress intended the breadth INS now asserts, it would have said so precisely as it did in § 242(d) regarding the release on bond of persons already found deportable.

IV. The Legislative History of Section 242 Does Not Support INS's Interpretation Of The Statute

INA § 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917, as amended (8 U.S.C. § 156), which provided that "pending the final disposal of the case of any alien taken into custody," the alien could be released "under bond," with "security approved by the Attorney General and conditioned that such alien *shall be produced when required for a hearing . . . and for deportation if he shall be found to be unlawfully within the United States.*" Act of Feb. 5, 1917, Ch. 29, § 20, 39 Stat. 874, 891 (1917) (emphasis added).

By 1949, Congress found this language inadequate to deal with its increased concern over INS's inability to execute orders of deportation entered against subversives and aggravated felons. H.R. 10, a bill "Facilitating Deportation of Aliens" -- introduced in Congress in 1950 but *never* enacted -- provided in part:

> Pending final determination of the deportability of any alien taken into custody . . . such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General . . . It shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody . . . and for deportation if an order for his deportation has been made.

Pub.L. 831, 81st Cong., lst Sess. § 23, *reprinted in* 1950 U.S. Code Cong. Serv. 1006. The primary purpose of the proposed legislation was to address the situation of aliens who had been determined to be deportable but whose removal from the country had not been accomplished by the INS.[28]

---

28 Of the six examples given in the House and Senate Reports, two were communist leaders who had been found deportable 18 and 21 years earlier; and four were criminals (two child molesters and two habitual

As Petitioners point out, Cert.Pet. 6, 23, the legislative history of H.R. 10 stated in part:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond . . . This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond . . *Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information . . .* The bill intends that the Attorney General shall have untrammeled authority to impose ***such*** conditions . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess., 6 (1949) (emphasis supplied); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950). The language regarding the Attorney General's "untrammeled authority" relates to release on bond *after a finding of deportability*. The examples immediately preceeding the "untrammeled authority" phrase are identical to the examples in the proposed statute dealing with persons already found deportable, not those awaiting hearings. In any event, the Supreme Court has specifically stated -- in response to an earlier attempt by the INS to rely on the "untrammeled authority" language in the history of H.R. 10 -- that "in carrying out [his bond authority under INA section 242], the Attorney General *is not left with untrammeled discretion* as to bail." *Carlson v. Landon*, 342 U.S. at 543 (emphasis added).[29]

As in the present law, H.R. 10 proposed to give the Attorney General *additional* authority as to aliens already found deportable. The Attorney General could require that they "conform to such reasonable written restrictions on their conduct or activities . . . as are prescribed by the Attorney General." 1950 U.S. Code Cong.Serv. 1006 (emphasis added). Clearly Congress knew how to use

---

criminals). H.Rep. 1192, 81st Cong., 1st Sess. (1949) at 8-9; S.Rep. 2239, 81st Cong., 2d Sess. (1950), at 7-8.

29 The legislative history of subsequent bond statutes, unlike the reports accompanying H.R. 10, do not suggest that the Attorney General has "untrammeled" authority to set conditions of bond.

language granting the Attorney General the authority to impose "restrictions" on the "conduct or activities" of aliens released following arrest.

In 1950 Congress enacted § 23 of the Subversive Activities Control Act of 1950, Pub. L. 831, 64 Stat. 987, 1010 (1950), the precursor of § 242(a), "in order to provide more effective control over, and *to facilitate the deportation of*, deportable aliens." Conference Report accompanying the Subversive Activities Control Act of 1950, reprinted at 1950 U.S. Code Cong. Serv. 3911 (emphasis supplied). The 1950 statute provided in relevant part:

> Pending final determination of the deportability of any alien . . . such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General . . . It shall be among the conditions of any such bond : . . that the *alien shall be produced, or will produce himself, when required to do so* . .
>
> If deportation has not been . . . possible . . . within six months from the date of the order of deportation the alien shall become subject to such further supervision . . . Such regulations shall require any alien . . . (4) to conform to such *reasonable written restrictions on his conduct or activities* as are prescribed by the Attorney General in his case.

Pub.L. No. 831, 81st Cong., 1st Sess. § 23, *reprinted in* 1950 U.S. Code Cong. Serv. 1006 (emphasis added). It is clear that in § 23 Congress was concerned with the *appearance* of persons for deportation hearings and eventual removal from the country, not with their employment or lack thereof. Again, as in H.R. 10 and in the present law, Congress distinguished between those in hearings -- i.e. Respondents and their class members -- and those already found deportable. Only as to the latter group did the statute grant authority to impose bond conditions regarding their post-release "conduct or activities." The Petition avoids this important distinction entirely.

These provisions in § 23 were incorporated with minor changes into the 1952 Act, and remain as INA § 242 today. Ch. 477, 66 Stat. 163 (1952). The legislative history of the 1952 Act adds little to this analysis. The House Report simply states that "this provision [§ 242], in general, follows the procedure established by § 23 of the Subversive Activities Control Act of 1950." H.R. Rep. 1365, 82d Cong., 2d Sess. 57 *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1711; S. Rep. No. 1137, 82d Cong., 2d Sess. 30 (1952). As already pointed out, the "procedure" under the 1950 Act only granted the Attorney General power to impose broad restrictions on the activities of persons released from detention *after* being found deportable. This distinction remains in the law today. *Compare* § 242(a)with § 242(d).

V. Neither Judicial Nor Administrative Authorities Support INS's Blanket "No Work" Bond Condition

The court of appeal allowed INS wide discretion in detention matters, holding that the Attorney General has "broad power," App. 22a, and concluding that the regulations "must be upheld if they are founded on 'considerations rationally related to the statute [the Attorney General] is administering.'" *Id.* 24a (citation omitted).

A. Judicial Precedent: Relying on *Carlson v. Landon, supra*, the INS insists it has authority to impose blanket bond conditions relating to employment. *Carlson* approved detention of alien communists under the Internal Security Act of 1950. The Court held such detention permissible only because national security was at stake and it had been shown that the *individual* detainees were Communist Party members who had indoctrinated others -- the specific detainees were "a menace to the public interest." *Id.* at 541.[30] The Court pointed to evidence *in each instance* of "membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence" which justified the decision to

---

[30] The Attorney General may detain a communist alien without bond *only* if he reasonably believes that the alien "may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement . . ." *Id.*, at 544.

detain. *Id.* at 541. The Court specifically noted that not *all* persons arrested as communists were denied bail. *Id.* at 541-42.

The *Carlson* Court confirmed the traditional requirements considered in setting bond in deportation cases:

> The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Id. at 540. In carrying out his bond authority, the Attorney General *"is not left with untrammeled discretion* as to bail." *Id.* at 543 (emphasis added).

Rubenstein v. Brownell, 206 F.2d 449 (D.C.Cir. 1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954), held that the exercise of discretion must be a reasonable one, *id.* at 445, and that where the alien was *not* dangerous to society and there was no suggestion that he would flee or hide, the Attorney General could *not* detain him. *Id.* at 456.

Five years after *Carlson*, in *United States v. Witkovich*, 353 U.S. 194 (1957), this Court reviewed the scope of § 242(d), concerning detention or release of "any alien against whom a final order of deportation . . . has been outstanding for more than six months." *Id.* In *Witkovich* INS, *inter alia*, restrained an alien from employment pending deportation pursuant to § 242(d). As in this case, the Attorney General argued in favor of the "eloquent breadth" of § 242, seeking the "broadest possible" discretion to impose bond conditions. 353 U.S. at 198. This Court rejected the claim:

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words [of § 242(d)] become operative . . . *The preoccupation with the entire subsection . . . is certainly with availability for deportation* . . . When Congress did want to deal with the far-flung interest of national security or the general

> undesirable conduct of aliens, it gave clear indication of this purpose, as in § 242(e) . . . *[I]t is permissible and therefore an appropriate construction to limit the statute to . . . all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens.*

Id. at 199-202 (emphasis added).[31] The INS could hardly enjoy greater power over persons it has proved neither aliens nor deportable than it enjoys over aliens ordered deported following a due process hearing.

As the court of appeal stated below, "[f]rom these cases emerges an unmistakable emphasis *on the situation of each individual* as the focus of the exercise of discretion." App. 32a (emphasis added).

B. Administrative Precedent: Prior to the promulgation of the "no-work" regulation, employment or the prospect of employment, whether INS "authorized" or not, had generally been considered by the Attorney General a positive factor in determining the conditions under which to release aliens from detention. App. 34a; *Matter of Patel*, Interim Dec. No. 2491 (BIA 1976) (Board of Immigration Appeals considered the alien's unauthorized employment a *positive* factor contributing towards the likelihood of his future appearance in deportation proceedings). Detention was not considered a permissible response to unauthorized employment. *Matter of Toscana-Rivas*, 14 I&N 523, 539, 542, Int.Dec. # 2256 (1973). Even the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542. The Attorney General found that employment-related conditions were acceptable during the six month period *after* deportability was established in "cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security." *Id.* at 556 (emphasis added). Furthermore, the

---

31 While *Witkovich* involved an alien under a "final order of deportation," this case involves persons awaiting the outcome of deportation proceedings. The statutory authority relied upon by Petitioners here -- § 242(a) -- grants *less* discretionary powers to the Attorney General than the powers granted in § 242(d).

Attorney General required an individualized showing, something absent from the blanket prohibition at issue here.[32]

In conclusion, as the Court of Appeals determined, all relevant judicial and administrative authority suggests that INS's challenged interpretation of INA § 242(a) is improper.

VI. The INA Nowhere Permits Indefinite Incarceration as a Control on Alien Employment

A. Pre-IRCA

Since 1952, Congress has amended the INA numerous times, including many provisions dealing with employment. However, it has never amended the detention provisions of § 242(a). While it is widely recognized that a "primary purpose in restricting immigration is to preserve jobs for American workers," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984), Congress has never seen fit to enact a statute providing for the detention of aliens who become employed without INS authorization. In fact, as pointed out above, Congress has repeatedly enacted provisions allowing aliens to win relief from deportation or regularize their status *despite* previous or on-going unauthorized employment.

B. IRCA Limits Controls to Employer Sanctions

i. IRCA Clearly Distinguishes Threats to National Security From Employment Concerns

Under IRCA national security grounds for exclusion remain grounds which may not be waived in the course of legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). Provisions of the Act maintained by IRCA exclude Communists or others who advocate overthrow of the Government. § 1182(a)(28)(C), (D), (F).[33]

---

[32] The Board has subsequently stated that it would only uphold an employment prohibition in a release bond when individualized information justified such a restriction. *Matter of Vea*, Interim Dec. #2890 at 5 (BIA 1981).

[33] This provision also continues to exclude "[a]liens who . . . the Attorney General knows or has reason to believe seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27).

In direct contrast, IRCA's legalization provisions specifically render inapplicable (not merely waivable at the Attorney General's discretion) the grounds for exclusion which govern aliens entering the United States for skilled or unskilled work without authorization. §§ 1255a(d)(2)(A), 1182(a)(14). IRCA continues the provisions which permit aliens to adjust their status to lawful permanent resident status regardless of prior unauthorized employment.[34]

The structure of the grounds of exclusion and provisions regarding regularization of status show that Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation posed by those threatening the national security.

ii. Congress in IRCA Approved "Employer" Sanctions, Not "Employee" Detention as the Means to Prevent Unauthorized Employment

IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those workers and businesses which might be adversely affected by the law. *See Immigration Reform, supra.*, 14 J.Legis. at 42.

For ten years preceeding the IRCA Congress repeatedly grappled with different methods for controlling the employment of aliens.[35] Culminating these efforts, the IRCA adds 8 U.S.C. § 1324a, which, for the first time, penalizes employers who knowingly hire

---

[34] Also, no alien may be found inadmissible on grounds concerned with becoming a public charge "if the alien demonstrates a history of employment [whether authorized or not] in the United States evidenecing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii).

[35] The IRCA, particularly as regards employer sanctions, builds upon Congress' earlier efforts. *See* 132 Cong. Rec. H9708 (1986) (remarks of Congressman Rodino); H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 51-56, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5655-5660; S. Rep. No. 99-132, 99th Cong., 1st Sess. at 18-27. For a history of the successive bills, *see* H.R. Rep. No. 99-682(I) at 51-55.

undocumented aliens.[36] The structure, language and legislative history of the IRCA all illustrate that Congress intended to control alien employment exclusively through such sanctions.

iii. Congress (And the INS in Testimony Before Congress) Specifically Rejected the Approach Adopted by INS In Its "No-Work" Regulation

As the Court of Appeal stated, the "no work bond condition, and the detention of individuals who violate that condition, is the very type of employee deterrence mechanism which Congress rejected in IRCA." App. 45a.

Beginning in 1971, the House Judiciary Committee, under the chairmanship of Rep. Peter W. Rodino, Jr., later to become the primary House author of IRCA, held hearings on alien employment controls. During these hearings James L. Hennessey, Assistant to the INS Commissioner, testified as follows:

MR. RODINO. [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?

HENNESSEY He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], *I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.*

Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No.

---

36 *See* H. R. Rep. No. 99-682(I) at 45 ("The bill [IRCA] establishes penalities *for employers* . . .")(emphasis added); *Id.* at 46 ("Employers will be deterred by the penalties in this legislation...").

13, pts. 1-5, pt. 1 at 46 [emphasis supplied] ("1971 Hearings"). Thomas M. Pederson, INS District Director for Detroit, Michigan, similarly discounted detention as an employment control:

PEDERSON. I believe that we ought to impose a penalty against the alien to help stop him [from working].

RODINO. What kind of penalty would you impose on the alien?

PEDERSON. Well, *I do not feel that a fine or imprisonment is the answer* . . . It could be possible to deny administrative relief of some form....

1971 Hearings, pt. 3 at 919 [emphasis supplied]. In floor debates Congressman Rodino summarized that "[a]dditional penalties [against immigrant workers] would serve no useful purpose . . ." 1118 Cong. Rec. 30155 (1972).

The House of Representatives passed legislation adopting employer-sanctions provisions during both the 92nd and 93rd Congresses. H.R. 16188, 92nd Cong., 2d Sess. (1972); H.R. 982, 93rd Cong., 2d Sess. (1973). Though neither bill received Senate action, controlling employment exclusively through sanctions against *employers* would remain the approach of all succeeding bills, eventually to be adopted in the IRCA itself.

In the months leading up to the passage of the IRCA, Congress considered and rejected detention of *employees* as a control on unauthorized entry and employment. A witness before the Senate Immigration Subcommittee, Dr. Barry Chiswick, proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. S. Hrg. 99-273, at 44-45. Correctly noting that this idea was "not something new," *id.* at 56, Senator Alan Simpson, Chairman of the Committee and primary author of IRCA in the Senate, scored Mr. Chiswick's approach as being "politically harsh, . . . [and] unrealistic..." Id. Senator Simpson expressed his opposition to the detention proposal, stating that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought, and the thought of the Select Commission, we ought to try the most humane one [i.e.

employer sanctions] first ... if we do not get that done, then we will go on to other methods ... [which today] are expressed out of frustration ..." *Id.*

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General concurred: only through "employer sanctions" can the "entry of illegal aliens into jobs" in the United States "be addressed effectively." *Id.* at 105.[37]

iv. The Challenged Regulation Directly Conflicts With and Frustrates Exemptions Contained In IRCA

Formulating what it considered to be a balanced approach to the issue, Congress provided that aliens *without* work authorization hired at the time of or before the enactment of the IRCA may continue to be employed *without* penalty on the employer. H. Rep. 99-603(I) at 56; 8 C.F.R. section 274a.7 (the "penalties" of employer sanctions "shall not apply to the continuing employment of an employee who was hired prior to November 7, 1986"). While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions,.INS's regulation makes *no* exemption for them at all.[38]

---

[37] During senate floor debates on the IRCA, the notion of penalizing employees come up once again. Senator Orin Hatch spoke against the bill because it "penalizes the wrong group for [the] actions of [illegal] individuals..." 118 Cong. Rec. S16912 (1986). Senator Hatch argued that the employed aliens, not their employers, should be penalized. *Id.* at S16912-16913. He was the *only* senator to openly support penalties against employees. His views, never formalized into a proposed amendment to the bill, were rejected by Congress.

[38] Employer sanctions was also not intended to reach the employers of "casual hires," whatever the workers' immigration status. H.R. Rep. No. 99-682(I), at 57; U.S. Code Cong. & Ad. News 5661. Nor does the IRCA address self-employment or work by independent contractors, and such work is apparently exempt from sanctions. INS's "no-work" regulation makes no room for these exceptions to Congress' enactment regarding alien-employment control.

Not only has the INS promulgated regulations which exempt, *inter alia*, "grandfathered" employees from the workings of employer sanctions, 8 C.F.R. § 274a.2(b)(v)(iii)(E),(G), but , as noted above in the Statement of the Case, other federal agencies, including the National Labor Relations Board, have similarly taken into account the statutory exemptions. The NLRB's September 1, 1988, Memorandum GC-88-9 notes that "[t]he penalty provisions and verification requirements [of IRCA] do not apply to periods of employmentthat began on or before November 6, 1986. . . .[T]he applicable INS regulations [8 C.F.R. § 274a.2(b)(v)(iii)(E),(G)] provide that the 'grandfather' requirement of continuing employment is met where an employee is reinstated after a wrongful termination . . ." *Id. at 3.* Accordingly, "by ordering the normal remedies of reinstatement and backpay for discriminatees who are 'grandfathered' under IRCA . . . the Board would not be acting in conflict with immigration law or policy." *Id.* at 4.[39] Clearly INS's "no-work" regulation conflicts with the agency's own regulation on "grandfathered" unauthorized employees, as well as the approach adopted by the NLRB in reliance on IRCA and INS regulations.

Even a casual reading of Petitioners' disapproved regulations reveals an attempt to regulate employment specifically left unregulated by Congress. Though the INS may remain "frustrated" over

---

[39] In *Del Rey Tortilleria, Inc and Local 76, International Ladies Garment Workers Union*, Case No. 13-CA-25033 (NLRB, Division of Judges, Dec. 7, 1988), the Board addressed the question whether "grandfathered" undocumented employees could be ordered reinstated under the National Labor Relations Act (NLRA) and in light of IRCA. The decision notes that INS's regulations enacted pursuant to IRCA provide that the "grandfather" requirement of continuing employment is met where the employee is reinstated after a wrongful discharge or pursuant to a settlement. Further, Congress stated IRCA's terms were not intended to "diminish in any way labor protections in existing law . . . In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' [in the NLRA]." H.R.Rep. No. 1,000, 99th Cong., 2d Sess. 58 (1986). Based on the above, reinstatement was ordered in *Del Rey Tortilleria, Inc.*.

Congress' failure to enact *employee* sanctions, Senator Simpson, with the full support of President Reagan and both Houses of Congress, flatly rejected jailing workers as a means to control their employment.

VII. Petitioners' "No-Work" Regulation Raises Significant Constitutional Questions

A cardinal tenet of statutory construction is that whenever possible statutes should be construed so as to preserve their constitutionality. *United States v. Harris*, 347 U.S. 612, 618 (1954). INS's "no work" bond regulation raises significant consitutional questions which the district court would be required to address if this Court reverses statutory decision..

For an individual who cannot comply the INS's terms for release, a no-work bond condition means *indefinite* detention -- the deprivation of all personal liberty.[40] The due process guarantee governs all government deprivations of liberty. *E.g., O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (involuntary confinement of mentally ill); *Youngberg v. Romeo*, 475 U.S. 307 (1975) (involuntarily committed persons retain a liberty interest in freedom of movement within the institution; *Addington v. Texas*, 441 U.S. 418 (1979) (individual may not be civilly committed based on a few isolated instances of idiosyncratic behavior).. Petitioners' regulation threatens severe injury -- loss of all personal liberty or the means to survive -- to achieve at best speculative results.[41] The INS failed to

---

40 This, of course, is the one of the most fundamental of all constitutional rights, for if the "liberty" protected by the Due Process Clause of the Fifth Amendment means anything, it means freedom from physical restraint. *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). Only an important governmental interest will justify infringing the right to be free from physical restraint. *Gernstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

41 The Government interest here is slight, if measurable at all. As we described in the Statement , *supra*, the unrebutted evidence establishes that INS's regulations would have *no* measurable impact on preserving jobs for U.S. workers, the primary interest asserted by the INS.

produce any evidence that its wishes cannot be realized by means less violent to personal liberty.

Turning to the procedural sufficiency of Petitioners' regulations,[42] in all the above-cases the Court, when it approved indefinite physical restraint, did so only because the individual confined had received a prior due process hearing.[43]

The Supreme Court has clearly stated that the detention provision (§ 23) of the 1950 Act must be read in light of the "due process [clause] of the Fifth Amendment." *Carlson*, 342 U.S. at 542. Due process would likely prohibit the Attorney General from promulgating a regulation under which "all persons arrested as deportable [aliens] under sec. 22 of the Internal Security Act .. . for communist membership are denied bail." *Id.*[44] This is such a case.

In *United States v. Witkovich*, this Court reviewed an employment prohibition imposed by INS against an alien under final order of deportation pursuant to § 242(d). The Court concluded that "[a]cceptance of the interpretation of Section 242(d) urged by the Government would raise doubts as to the statute's validity . . ." 353 U.S. at 200. INS's arguments in this case are the same ones they made in *Witkovich*. The same doubts are raised today about the constitutionality of the INS's interpretation of § 242(a).

---

42 The INS is bound to accord procedural due process, particularly where it would deprive persons of personal liberty. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950).

43 *Addington*, 441 U.S. at 420 (jury trial "extended over six days" prior to committment); *O'Connor*, 422 U.S. at 565 (committment "[a]fter hearings before a county judge"). In the instant case, Petitioners admit that persons confined as a result of their regulations *never* receive a due process hearing.

44 Even as to the detention of alien communists, the Attorney General "must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543. The Attorney General may detain a communist alien without bond only if he reasonably believes that the alien "may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement . . ." *Id.* at 544.

CONCLUSION

The INS contends that its "no-work" regulation does no more than "fill [a] gap left by Congress." Appellants' Brief to Ninth Circuit at 25. INS has not just filled a "gap" left by Congress, they have themselves seized the legislative function, ruling by administrative decree who shall work and who shall not -- who shall be jailed indefinitely and who shall not. The INS, an agency daily embroiled in the business of law *enforcement*, is hardly better qualified than Congress when it comes to law *making* in this sensitive area of diverse national concern.

The Petition for Certiorari should be denied.

Respectfully Submitted,

PETER A. SCHEY
Counsel of Record
CARLOS HOLGUIN
CENTER FOR HUMAN RIGHTS
AND CONSTITUTIONAL LAW.

SUSAN GZESH
CHICAGO LAWYERS COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

ANTONIO RODRIGUEZ
EAST L.A. IMMIGRATION PROJECT

DANIEL KATZ
CENTRAL AMERICAN REFUGEE CENTER

Attorneys for Respondents

MARCH 1991